

ORIGINAL

DOCKET FILE COPY ORIGINAL
Before the

Federal Communications Commission
Washington, D.C. 20554

FILED/ACCEPTED

NOV 14 2007

Federal Communications Commission
Office of the Secretary

In the Matter of

Improving Public Safety Communications In
the 800 MHz Band

Consolidating the 800 and 900 MHz
Industrial/Land Transportation and Business
Pool Channels

Amendment of Part 2 of the Commission's Rules
Allocate Spectrum Below 3 Ghz for Mobile and
Fixed Services to Support the Introduction of New
Advanced Wireless Services, including Third
Generation Wireless Systems

Petition For Rule Making of the Wireless
Information Networks Forum Concerning the
Unlicensed Personal Communications Service

Petition For Rule Making of UT Starcom, Inc.,
Concerning the Unlicensed Personal
Communications Service

Amendment of Section 2.106 of the Commission's
Rules to Allocate Spectrum at 2 Ghz for Use by
the Mobile Satellite Service

To: The Commission

WT Docket 02-55

ET Docket No. 00-258

RM-9498

RM-10024

ET Docket No. 95-18

**CITY OF BOSTON, ET AL.
REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION
AND OPPOSITION TO MOTION TO STRIKE**

Petitioners' hereby reply to the Opposition filed by Sprint Nextel Corporation to Petitioners'
timely filed Petition for Partial Reconsideration ("Opposition") and Opposition To Motion To

No. of Copies rec'd
List ABCDE

04-11

Strike¹. Sprint Nextel's arguments mirror those of the Commission that have been shown to be fully improper by the contents of the Petition and nothing allegedly contributed by Sprint Nextel has added one scintilla of additional law or logic to support the Commission's *Second Memorandum Opinion and Order*².

Sprint Nextel's Opposition Adds Nothing

At Pages 2-3 of the Opposition, Sprint Nextel engages in an errant application of law by its allowing that the Commission was proper in relying upon a Public Notice produced by the Bureau as the basis for the Commission's decision. This is, of course, contrary to all application of law since the Bureau does not possess the authority to bind the Commission or to create rules outside of the mandates of the Administrative Procedures Act by which the Commission must deem itself bound to follow. This obvious misapplication of law is blithely ignored by Sprint Nextel in a manner that is equal to the actions taken by the Commission and is, therefore, equally flawed.

At Page 3 of the Opposition, Sprint Nextel challenges Petitioners' assertion that the Commission possesses all authority necessary to include the subject costs as a portion of the costs

¹ Having reconsidered its position in view of its underlying agenda, to assure that all actions taken by the Commission are based on a full and open record of notice and comment, Petitioners hereby withdraw their Motion To Strike and, if necessary, requests that the Commission accept the instant pleading as necessary to the process to assure that the subject of these competing petitions receives adequate and complete comments. Additionally, Sprint Nextel's recently filed Opposition To Motion To Strike raises additional, previously untreated issues which must be addressed herein, thus, acceptance of the instant pleading is appropriate.

² Improving Public Safety Communications in the 800 MHz Band, *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007) (*Second Memorandum Opinion and Order*)

to be reimbursed by Sprint Nextel pursuant to its rebanding obligations. However, Sprint Nextel's challenge is nothing more than a citation to the Commission's statements within its *Second Memorandum Opinion and Order*, that Petitioners demonstrated to be legally flawed. Sprint Nextel's addition to the record on this point amounts to nothing more than, "we agree with the Commission for the reasons provide in the *Second Memorandum Opinion and Order*." With all due respect, Sprint Nextel's efforts forwards the discussion not a jot.

At Page 4 of the Opposition, Sprint Nextel claims that it never intended to bear the subject costs. Unfortunately for Sprint Nextel, there exists no evidence of this intention. The language of the Commission's relevant Orders³ does not condition or exclude such costs. To the contrary, the language states that Sprint Nextel will bear all such costs and no distinction is made that supports a differing treatment of costs, whether such costs arise pre, during or post mediation. Sprint Nextel is, therefore, left with the benefit (and costs) of its bargain made with the Commission, and those costs clearly include post-mediation litigation costs.

At Pages 4-5 of the Opposition, Sprint Nextel engages in obvious sophistry and attempts to argue via conclusion rather than analysis. Petitioners examined and analyzed the specific language of the relevant Orders, including the Regulatory Flexibility Analysis. Each relevant statement by the Commission and memorialized within its Orders was considered by Petitioners. The net effect of

³ Improving Public Safety Communications in the 800 MHz Band, *Fifth Report and Order*, *Fourth Memorandum Opinion and Order*, and *Order*, 19 FCC Rcd 14969 (2004); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (collectively referred to herein as "Orders").

the Commission's Orders is clear, time and time again. Incumbents may seek reimbursement for ALL costs arising from the resolution of disputes. No other interpretation is supported by the record, which repeats this statement in telling ways. Certainly, there is only one interpretation of the word "all" and Sprint Nextel did not provide it in its Opposition.

With all due respect, Sprint Nextel's echoing of the Commission's similarly belated interpretation, that "all" does not mean "all" and that the Commission did not intend for such costs to be borne by Sprint Nextel, is equally unconvincing. Under law the unreported and unknown intentions of the agency which cannot be reasonably discerned by the plain language of the Orders cannot be used to reduce or delay the rights of regulatees. Rather, the plain language of the Orders is controlling for all purposes. Since the Orders contain no vagueness or ambiguity that is subject to the Commission's and Sprint Nextel's later, convenient reinterpretation, then the Orders must stand as written, including incumbent licensees' rights to obtain reimbursement for the subject costs.

At Pages 6-7 of the Opposition, Sprint Nextel argues that the *Second Memorandum Opinion and Order* represent sound policy. Petitioners strongly disagree with this statement for the reasons provided in their Petition. Additionally, Sprint Nextel's argument misses the most salient point of the controversy. Whether the Commission's decision represents alleged sound policy is irrelevant unless such policy is also backed by proper notice and comment rule making, which it is not. Policy, sound or absurd, is not actionable without agency compliance with the mandates dictated under Title 5 of the United States Code. Since neither Sprint Nextel nor the Commission can demonstrate the Commission's compliance with the mandates of the Administrative Procedures Act, then the unstated

intentions of the Commission and the consideration of policy after the fact are not relevant to the matter before the Commission.

Finally, Petitioners would be wholly remiss if they did not note the disingenuous nature of Sprint Nextel's position, which cannot be reconciled with its recently filed Notice of Appeal to the Commission's, *In re Improving Public Safety Communications in the 800 MHz Band*, *Third Memorandum Opinion and Order*, FCC No. 07-167, 72 Fed. Reg. 55,208 (September 28, 2007). In its Notice of Appeal, Sprint Nextel challenges the Commission for its having "unlawfully modified the terms of the company's 800 MHz band licenses and are arbitrary, capricious and otherwise contrary to law." *Id.* at 2. Accordingly, Sprint Nextel would allow the Commission in its *Second Memorandum Opinion and Order* to exceed its statutory authority in denying rights granted to incumbent licensees, but Sprint Nextel would challenge the Commission's equal action when the effect might be adverse to Sprint Nextel's limited interests, and it would hold the agency to the strict dictates of law in the creation of additional obligations upon licensees, including Sprint Nextel. The fact that Petitioners, on the whole, agree with Sprint Nextel's actions taken pursuant to its Notice of Appeal, demonstrates a consistency of position by Petitioners. The fact that Sprint Nextel is motivated only by self interest and not the law, calls into question the genuineness of its statements made in this matter.

Sprint Nextel's Gratuitous Attack on Boston Is In Error

In its Opposition to Motion To Strike, Sprint Nextel mischaracterizes entirely the status of the City of Boston's⁴ participation in the rebanding effort. In fact, Boston participated in good faith in the negotiation of the subject FRAs. That the parties were not able to arrive at a mediated settlement of issues in dispute is not evidence of Boston's recalcitrance for any purpose, nor does it represent any wilful delay on Boston's part.⁵ Rather, it represents an incumbent licensee's exercise of those due process rights granted by the Commission within this docket and a differing of opinion between Boston and Sprint Nextel regarding reimbursable costs. Accordingly, Sprint Nextel's statement at Page 3 of its Opposition to Motion To Strike that "the City of Boston has made no effort to retune its facilities" is a misrepresentation of the facts. The City has spent numerous hours planning its rebanding, negotiating with vendors, and preparing itself to move forward with its rebanding effort. What the City of Boston could not control is Sprint Nextel's consistent refusal to provide necessary funding to the project. And the City was fully within its rights to forward its efforts to obtain all necessary funding.

Although the City contends that post-mediation litigation could have been avoided had Sprint Nextel observed more diligently the dictates of the Commission's Orders and accepted the recommendations of the Transition Administrator Mediator, Sprint Nextel's comments have become

⁴ Sprint Nextel inexplicably ignored the remaining Petitioners in its attack and focused its attention on the sole petitioner that was participating in a *de novo* review by an ALJ.

⁵ In fact, there is no allegation that Boston's participation in rebanding efforts involves bad faith or improper delay and no such suggestion was made by either the Bureau or the Transition Administrator Mediator in its Recommended Resolutions.

moot because the parties have agreed to settle all outstanding disputes before the Administrative Law Judge, which settlement now provides adequate funding to the City to accomplish rebanding. The City avers that but for its willingness to defend its rights to proper reimbursement for all tasks arising out of rebanding as against Sprint Nextel's position, the City's rebanding of its 1-120 channels would take much longer to perform. Therefore, the party creating needless delay of the rebanding effort was not the City of Boston, but Sprint Nextel.

Sprint Nextel's statements are again without factual foundation and ignore entirely the law in this area. There exists no facts to support Sprint Nextel's conclusion that the City of Boston has ever engaged in frivolous activity. To the contrary, the terms of the aforementioned settlement belie any such conclusion. Nor can Sprint Nextel point to any relevant law which states, in essence, that a person engaging in the procedures adopted by the Commission pursuant to rule making is acting improperly. Or that a licensee that seeks protection within its granted due process rights is to be vilified for exercising those rights. It is Sprint Nextel's steadfast refusal to accept the notion of equal protection and cost neutral rebanding that creates public safety licensees' need to seek protection from the Commission. It is Sprint Nextel's attempt to besmirch and bully public safety licensees which makes such protection necessary, as the Commission fully recognized in its Orders. In attempting to defame the City of Boston, Sprint Nextel illustrated why post-mediation costs must be found to be reimbursable.

Accordingly, if any delay has been suffered by the City of Boston and other affected licensees, that delay is the direct result of Sprint Nextel's refusal to provide adequate funding to the

City to accomplish the myriad duties arising directly from rebanding. That Sprint Nextel placed the City in the unenviable position of having to litigate to obtain necessary funding is evidence of the need for the Commission to find upon reconsideration that post-mediation litigation costs are a reimbursable expense.

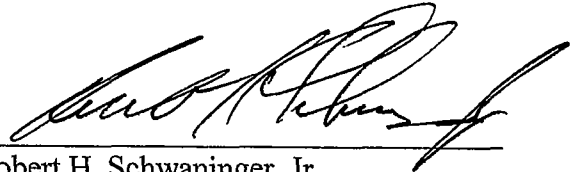
Conclusion

Sprint Nextel's Opposition added nothing of factual or legal value to the matter addressed within the Petition, excepting the following: given a copious amount of time to respond to the Petition, beyond any time allowed under procedure or law, Sprint Nextel was obviously unable to mount even a single useful challenge to Petitioners' well brought positions. It is, therefore, telling that the best Sprint Nextel could come up with is, in essence, "we agree with the Commission because we like that outcome." That is wholly insufficient and undermined by Sprint Nextel's later filed Notice of Appeal.

Equal protection under law and equal application of the Commission's Orders requires the Commission to rule in accord with law, not based on whether a single, affected licensee is pleased. As Petitioners stated repeatedly, Sprint Nextel was provided ample opportunity to accept or reject the Commission's offer contained in its Orders, as then plainly written -- a choice not afforded Petitioners. Sprint Nextel's having accepted the duties articulated under those Orders, neither the Commission nor Sprint Nextel is positioned to alter materially Sprint Nextel's duties to the detriment of licensees that have moved in reasonable reliance upon the plain language of those Orders.

Therefore, for the reasons stated above and for good reason shown, upon reconsideration the Commission should grant the Petition.

Respectfully submitted,
CITY OF BOSTON, ET AL.

A handwritten signature in black ink, appearing to read "Robert H. Schwaninger, Jr.", written over a horizontal line.

Robert H. Schwaninger, Jr.

Dated: November 14, 2007

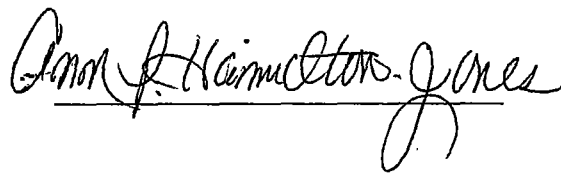
Schwaninger & Associates, P.C.
1331 H Street, N.W., Suite 500
Washington, D.C. 20005
rschwaninger@sa-lawyers.net

Certificate of Service

I, Ann Hamilton Jones, hereby certify that on November 14, 2007 a copy of the foregoing Reply to Opposition to Petition For Reconsideration and Opposition to Motion to Strike was sent via first class, postage prepaid U.S. mail to the following persons:

Regina M. Keeney
Charles W. Logan
Stephen J. Berman
Lawler, Metzger, Milkman & Keeney, LLC
2001 K Street, N.W., Suite 802
Washington, D.C. 20006

Robert S. Foosaner
Lawrence R. Krevor
James B. Goldstein
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, Virginia 20191


A handwritten signature in cursive script, reading "Ann Hamilton Jones", is written over a horizontal line.